This document contains materials subject to a Protective Order entered in this action. Its contents are not to be displayed, revealed or made public, except by order of the Court.

Francis J. Earley (FE-7520)
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY and POPEO, P.C.
666 Third Avenue
New York, New York 10017
(212) 935-3000

ATTORNEYS FOR AUSTRALIAN GOLD, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

v.

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff.

05 CV 1217 (JS)(ML)

AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

v.

LARRY SAGARIN AND JOHN DOES, 1-10,

Third Party Defendants,

DECLARATION OF SCOTT D. MATTHEWS

Dockets.Justia.com

Francis J. Earley (FE-7520)
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY and POPEO, P.C.
666 Third Avenue
New York, New York 10017
(212) 935-3000

ATTORNEYS FOR AUSTRALIAN GOLD, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, v. AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	05 CV 1217 (JS)(ML)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, v. LARRY SAGARIN AND JOHN DOES, 1-10, Third Party Defendants,	

DECLARATION OF SCOTT D. MATTHEWS

SCOTT D. MATTHEWS, pursuant to 28 U.S.C. § 1746, declares:

1. I am a member of the Indiana bar and associated with the law firm of Ice Miller in Indianapolis, Indiana. I am admitted *pro hac vice* in this lawsuit and represent Defendant Australian Gold, Inc.

2. Australian Gold's co-counsel is Francis J. Earley, a member of the New York bar and associated with Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.

3. I make this Declaration based on personal knowledge in support of Defendant's motion under Federal Rules of Civil Procedure 26, 37 and 45 to compel non-parties and to produce documents requested in the subpoena dated November 7, 2005, and to produce documents requested in the subpoena dated October 7, 2005, and for all non-parties to be ordered to pay Australian Gold its reasonable costs and attorneys' fees incurred in making this motion.

4. On October 7, 2005, Australian Gold served subpoenas on the four suppliers that it has disclosed as its source for the Australian Gold, Swedish Beauty and Caribbean Gold tanning lotions. Service of process was effected by hand delivery on all four suppliers. A true and correct copy of the subpoena served on and the return of service is attached hereto as *Exhibit 1.* response was due on or before October 21, 2005, but it failed to respond.

5. On October 25, 2005, provided a handwritten response to the October 7, 2005 subpoena. The response was signed by and provided a telephone number for Australian Gold to call. A true and correct copy of response is attached hereto as *Exhibit 2.* Among other things, stated that all invoices and sales by to S & L Vitamins were "thrown out upon payment." claimed that it had no documents responsive to the transactions between it and S & L Vitamins.

REDACTED

6. On October 27, 2005, I telephoned and spoke with him concerning his handwritten response. confirmed that he and other business partners operated at least two tanning salons in the Long Island area under the name of . He informed me that one of his tanning salons was an Australian Gold premier salon. Premier salons have three year contracts with Australian Gold to exclusively sell Australian Gold and Swedish Beauty Products. In consideration for participating as a premier salon, the salon receives special bonus cash back and rebates directly from Australian Gold.

7. informed me that S & L Vitamins placed orders once or twice a week with Large orders were in the $2,000.00-$3,000.00 range. stated that S & L Vitamins always paid for its purchases by check and that invoices were generated reflecting the transactions. claimed that all invoices were destroyed upon completion of the transaction.

8. I asked not to destroy any invoices in the future and to forward them to me. stated that he would do so. To date, I have not received any invoices from

9. Following the telephone conversation, I sent a letter confirming our conversation. I specifically advised him not to discard any invoices relating to sales to S & L Vitamins and again requested that he produce invoices of sales to S & L Vitamins. A true and correct copy of this letter is attached hereto as *Exhibit 3*.

10. As a follow up to the telephone conversation, Australian Gold, by counsel, served a second subpoena on and on November 2, 2005. A true and correct copy of this subpoena is attached hereto as *Exhibit 4*.

REDACTED

11. Among other things, Australian Gold sought telephone records used by and because such information would confirm whether S & L Vitamins had placed telephone calls to Australian Gold also sought bank records because these records would tend to show payments received from S & L Vitamins, especially since all payments were by check and presumably deposited in checking account. Since confirmed that it was an Australian Gold premier salon, Australian Gold also requested rebate checks, correspondence and agreements between and Australian Gold because Australian Gold may have claims against if it is one of the suppliers that is diverting products to S & L Vitamins.

12. and response to the second subpoena was due on or before November 14, 2005, but they have failed and refused to respond to the second subpoena.

13. For the reasons set forth above and fully explained in the accompanying Memorandum of Law, I respectfully request that the Court grant the Defendant's motion to compel non-parties and to produce documents requested in the subpoenas and to pay Australian Gold its reasonable attorney fees and costs associated with filing this motion.

14. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2005.
Indianapolis, IN

Scott D. Matthews

INDY 1649943v.1

REDACTED

EXHIBIT 1

Issued by the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, v. AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	05 CV 1217 (JS)(ML)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, v. LARRY SAGARIN AND JOHN DOES, 1-10, Third Party Defendants,	

TO: REDACTED

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See List of Documents on Attachment A

	DATE AND TIME
Offices of Mintz Levin Cohn Ferris Glovsky and Popeo, PC, Chrysler Center, 666 Third Avenue, 25th Floor, New York, New York 10017	October 21, 2005 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subject to this subpoena for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedures 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Australian Gold, Inc.	October 7, 2005

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Francis J. Earley, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.
Chrysler Center, 666 Third Avenue, 25th Floor, New York, New York 10017, Phone: (212) 692-6230

Exhibit 1

(See Rule 45, Federal Rules of Civil Procedure, Parts C&D on Reverse)

PROOF OF SERVICE

DATE PLACE

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED ON (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on ____________________

DATE

____
SIGNATURE OF SERVER

____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A Party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoenas. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A Person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden,

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ATTACHMENT A

DEFINITIONS

1. The list of documents set forth below incorporates by reference the Uniform Definitions of Discovery Requests set forth in Local Civil Rule 26.3.

2. Without limiting the definition provided in Rule 26.3, the term "document" is used herein in the broadest possible sense and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies and drafts of the following items, whether printed or recorded (through a sound, video, computer, digital, optical or magnetic recording system) or reproduced by hand: contracts, agreements, communications, writings, correspondence, telegrams, facsimiles, memoranda, records, reports, books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, diaries, calendars, forecasts, statistical statements, work papers, e-mails, web-pages, electronic bulletin boards, ledgers, drafts, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, consultant's reports, appraisals, records, reports or summaries of negotiations, brochures, pamphlets, circulars, trade letters, press releases, notes, marginal notations, bills, invoices, checks, photographs, tape recordings, videotapes, microfilm, microfiche, floppy diskettes, lists, journals, advertisements, file folders, computer tapes and hard drives, source code, object code or other computer language or recording, and any other writing or medium for the storage, retrieval, recording, compilation, or transmission of data, whether mechanical, electromagnetic or other, of whatever description, however produced or reproduced, together with all programs, manuals, handbooks, passcodes, passwords, or any other information necessary to interpret or access such data, within your possession custody or control, including documents within the files of your attorneys, consultants, accountants or agents.

DOCUMENT REQUESTS

1. Any and all documents related to any communications between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.

2. Any and all copies of any contracts or agreements between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin which have been executed or were in effect from January 1, 2002 through the present.

3. Any and all documents that reflect all sales made by you to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present for any Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions.

4. Any and all purchase orders received by you from S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin for the purchase of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions.

5. Any and all invoices related to your sale of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.

6. Any and all e-mails between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.

7. Any and all documents related to any ownership interests, management or control of your business by S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin.

8. Any and all documents which identify any distributor or supplier from whom you have ordered or purchased, or attempted to order or purchase, any Australian Gold, Swedish Beauty and/or Caribbean Gold Products from January 1, 2002 through the present, including any and all purchase orders, invoices, contracts, or agreements.

EPS Judicial Process Service, Inc.
29-27 41st Avenue, Suite 812
Long Island City, NY 11101
Telephone: 718-472-2900
Facsimile: 718-472-2909

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X

S&L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

-against-

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff,

---X

AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

-against-

LARRY SAGARIN and JOHN DOES 1-10,

Third Party Defendants,

---X

Index No. 05 CV 1217
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
:ss:
COUNTY OF QUEENS)

MELISSA EGEBO, being duly sworn deposes and says:

I am not a party to this action, am over the age of eighteen years of age, and reside in the State of New York.

On the 11th day of October, 2005, at approximately 4:00 p.m. at , New York, I served a true copy of the SUBPOENA IN A CIVIL CASE, in the above entitled-action, upon by personally delivering to and leaving thereat, a true copy of the above mentioned document with . At time of service, identified himself as the Manager for and as a person authorized to accept service of process for

REDACTED

REDACTED

is a Caucasian male, approximately 40-45 years of age, 6'2" tall, 190 lbs, with dark hair and dark eyes.

Sworn to before me this,
11th day of October, 2005

NOTARY PUBLIC

CLENDY J. CALDERON
Notary Public, State of New York
No. 01CA6115564
Qualified in Queens County
Commission Expires September 7, 2008

MELISSA EGEBO
Organization License No. 1155020

EXHIBIT 2

Issued by the

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, v. AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	05 CV 1217 (JS)(ML)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, v. LARRY SAGARIN AND JOHN DOES, 1-10, Third Party Defendants,	

TO: REDACTED

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See List of Documents on Attachment A

	DATE AND TIME
Offices of Mintz Levin Cohn Ferris Glovsky and Popeo, PC, Chrysler Center, 666 Third Avenue, 25th Floor, New York, New York 10017	October 21, 2005 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subject to this subpoena for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedures 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Australian Gold, Inc.	October 7, 2005

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Francis J. Earley, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.
Chrysler Center, 666 Third Avenue, 25th Floor, New York, New York 10017, Phone: (212) 692-6230

Exhibit 2

(See Rule 45, Federal Rules of Civil Procedure, Parts C&D on Reverse)

PROOF OF SERVICE

DATE PLACE

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED ON (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on ____________________

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A Party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A Person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena .

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ATTACHMENT A

DEFINITIONS

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2. Without limiting the definition provided in Rule 26.3, the term "document" is used herein in the broadest possible sense and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies and drafts of the following items, whether printed or recorded (through a sound, video, computer, digital, optical or magnetic recording system) or reproduced by hand: contracts, agreements, communications, writings, correspondence, telegrams, facsimiles, memoranda, records, reports, books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, diaries, calendars, forecasts, statistical statements, work papers, e-mails, web-pages, electronic bulletin boards, ledgers, drafts, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, consultant's reports, appraisals, records, reports or summaries of negotiations, brochures, pamphlets, circulars, trade letters, press releases, notes, marginal notations, bills, invoices, checks, photographs, tape recordings, videotapes, microfilm, microfiche, floppy diskettes, lists, journals, advertisements, file folders, computer tapes and hard drives, source code, object code or other computer language or recording, and any other writing or medium for the storage, retrieval, recording, compilation, or transmission of data, whether mechanical, electromagnetic or other, of whatever description, however produced or reproduced, together with all programs, manuals, handbooks, passcodes, passwords, or any other information necessary to interpret or access such data, within your possession custody or control, including documents within the files of your attorneys, consultants, accountants or agents.

DOCUMENT REQUESTS

1. Any and all documents related to any communications between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present. There are none.

2. Any and all copies of any contracts or agreements between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin which have been executed or were in effect from January 1, 2002 through the present. There are none,

3. Any and all documents that reflect all sales made by you to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present for any Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions. All Invoices thrown out upon payment

4. Any and all purchase orders received by you from S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin for the purchase of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions. There are None

5. Any and all invoices related to your sale of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present. There are none, Copies could be gotten From my lotion distributor.

6. Any and all e-mails between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present. There are None

7. Any and all documents related to any ownership interests, management or control of your business by S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin. S&L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and Larry Sagarin have absolutely no ownership interests, management or control of my business.

8. Any and all documents which identify any distributor or supplier from whom you have ordered or purchased, or attempted to order or purchase, any Australian Gold, Swedish Beauty and/or Caribbean Gold Products from January 1, 2002 through the present, including any and all purchase orders, invoices, contracts, or agreements. Invoices would have to be gotten from my distributor's since I throw them out. My distributors are Future Industries, Four Seasons, Heartland and Alternative tan. Also Sun Tan supply and Star Tan North.

Thank you for your time

REDACTED

EXHIBIT 3

ICEMILLER
LEGAL & BUSINESS ADVISORS

October 27, 2005

Writer's Direct Number: 317-236-2179
direct fax: 317-592-5418
scott.matthews@icemiller.com

Via Federal Express

REDACTED

Re: Australian Gold, Inc. v. S&L Vitamins, Inc. and Larry Sagarin

Dear

This letter confirms our conversation today concerning the subpoena we served on you and your sale of Australian Gold, Swedish Beauty, and Caribbean Gold tanning lotions to S&L Vitamins, Inc. and Larry Sagarin.

Australian Gold, Sagarin and his business are in litigation over the sale of these products over the internet. You have admitted to selling to Sagarin but claim that you do not have any records to verify these sales. You stated that all invoices that you prepare reflecting sales to S&L Vitamins and/or Sagarin are given to Sagarin, reviewed by him and returned to you. You claim that you throw these invoices away.

This letter shall put you on notice that invoices of sales to S&L Vitamins and Sagarin are evidence in Australian Gold's claims against Sagarin and were specifically requested in the subpoena we served on you on October 7, 2005. **You must not discard any invoices relating to sales to S&L Vitamins, Sagarin, or any person or entity related to any of them until further notice from us.** Documents related to all future transactions must be retained. If you fail to retain copies of these records, you will be subject to a claim of spoliation of evidence which we will bring before the United States District Court for the Eastern District of New York.

Copies of all documents related to sales to S&L Vitamins, Sagarin, or any person or entity related to any of them must be provided to me. You have agreed to comply with the subpoena and send us this information. We will expect you to do so in a timely manner. Since Sagarin places orders as frequently as 1 to 2 times per week, we will expect to receive these documents on a regular basis. You may send them to me via facsimile at (317) 592-5418.

You also informed me that Sagarin always paid by check, but claimed that you had no proof of payment. This information is easily verifiable through your bank records and your accountant. Please provide us with the name of your bank so we may issue a subpoena. Also, please provide me with the name and telephone number of your accountant.

I cannot stress how important it is to be completely honest with me. I know that you and Mr. Sagarin are long-time acquaintances but your failure to be completely truthful in responding to the subpoena could have serious ramifications.

Exhibit 3

Thank you for your cooperation.

Sincerely,

ICE MILLER

Scott D. Matthews

/nlw

cc: Francis J. Earley

INDY 1631459v.1

EXHIBIT 4

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

United States District Court

EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

v.

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff.

x

AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

v.

LARRY SAGARIN AND JOHN DOES, 1-10,

Third Party Defendant,

x

SUBPOENA IN A CIVIL CASE

CASE NUMBER:[1] 05-CV 1217(JS)(ML)

TO:

REDACTED

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objections at the place, date, and time specified below (list documents or objects):

SEE ATTACHED EXHIBIT A

PLACE	DATE AND TIME
MINTZ LEVIN COHEN FERRIS GLOVSKY AND POPEO, P.C. Chrysler Center 666 Third Avenue New York, NY 10017	11/14/2005 5:00 p.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more

[1] If action is pending in district other than district of issuance, state district under case number.

Exhibit 4

officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designed, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE 11/2/05
ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER Francis J. Earley, MINTZ LEVIN COHEN FERRIS GLOVSKY AND POPEO, P.C., Chrysler Center, 666 Third Avenue, New York, NY 10017, telephone (212) 935-3000	

(See Rule 45, Federal Rules of Civil Procedure, Parts C&D on Reverse)

AO 88 (Rev. 1/94) Subpoena in a Civil Case

	DATE	PROOF OF SERVICE	PLACE
SERVED			

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED BY (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on ______________________

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party service the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Exhibit A

1. All telephone records for the last two years for the telephone number or any other telephone number used by

2. All telephone records for cellular telephone number, including but not limited to or any other telephone number used by for the last two years.

3. All bank statements for for the last two years.

4. Any and all financial records of related to sales of Australian Gold™, Swedish Beauty™ or Caribbean Gold™ tanning lotions for the last two years.

5. Any and all records prepared or maintained by for purchases of Australian Gold™, Swedish Beauty™ and/or Caribbean Gold™ for the last two years.

6. All corporate tax returns for for the tax years 2003 and 2004.

7. All individual tax returns for all owners of for the tax years 2003 and 2004.

8. Any and all invoices prepared by given to or shown to Larry Sagarin, S & L Vitamins, Inc., Body Source, Steve (last name unknown), or any other agent or employee of any of them.

9. Copies of any and all rebate checks received from Australian Gold.

10. Copies of any and all correspondence between and/or any of its owners or employees and Australian Gold.

11. Any and all agreements between and Australian Gold.

REDACTED

12. An employee list of all owners and current employees of including their name, address and telephone number.

REDACTED

INDY 1631563v.1

EPS Judicial Process Service, Inc.
29-27 41st Avenue, Suite 812
Long Island City, NY 11101
Telephone: 718-472-2900
Facsimile: 718-472-2909

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
S&L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

Index No. 05 CV 1217
AFFIDAVIT OF SERVICE

-against-

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff,
---X
AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

-against-

LARRY SAGARIN and JOHN DOES 1-10,

Third Party Defendants,
---X

REDACTED

STATE OF NEW YORK)
:ss:
COUNTY OF QUEENS)

MELISSA EGEBO, being duly sworn deposes and says:

I am not a party to this action, am over the age of eighteen years of age, and reside in the State of New York.

On the 3rd day of November, 2005, at approximately 9:35 a.m. at New York, I served a true copy of the SUBPOENA IN A CIVIL CASE, in the above entitled-action, upon by personally delivering to and leaving thereat, a true copy of the above mentioned document with

At time of service, dentified himself by name and when inquired, informed me that he is not enrolled or is in the military.

REDACTED

is a Caucasian male, approximately 25-30 years of age, 5'5" tall, 250 lbs, with dark hair and dark eyes.

Sworn to before me this,
3rd day of November, 2005

NOTARY PUBLIC

CLENDY J. CALDERON
Notary Public, State of New York
No. 01CA6115564
Qualified in Queens County
Commission Expires September 7, 2008

MELISSA EGEBO
Organization License No. 1155020